

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| MARTIN L. and NANCY G. STONE | : | DECISION |
| for Redetermination of a Deficiency or for Refund of | : | DTA No. 811348 |
| Personal Income Tax under Article 22 of the Tax Law for | : | |
| the Year 1990. | : | |

Petitioners Martin L. and Nancy G. Stone, Box 208, Watermill, New York 11976, filed an exception to the order of the Administrative Law Judge issued on November 10, 1993.

Petitioners appeared by Jerome D. Lebowitz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation submitted a letter on March 8, 1994 stating it would not be filing a brief in opposition, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners' request for a conciliation conference was properly denied as untimely filed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "1" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

We modify the Administrative Law Judge's finding of fact "1" to read as follows:

The Division of Taxation ("Division") issued to petitioner¹ a notice of deficiency, dated December 30, 1991, asserting income tax due of \$3,100.00, plus interest, for the year 1990.²

On July 23, 1992, petitioner mailed a request to the Bureau of Conciliation and Mediation Services for a conciliation conference.

On September 25, 1992, the conciliation conferee issued an order dismissing petitioner's request as late filed.

On October 16, 1992, petitioner, by his representative, notified the Division that he was taking exception to the determination of the conciliation conferee dismissing petitioner's request for a conciliation conference.

On November 10, 1992 petitioner filed a petition with the Division of Tax Appeals for redetermination of the deficiency or for refund of income taxes and cancellation of the interest charged. The petition sets forth the basis for petitioner's protest on the merits, namely that the Commissioner of Taxation and Finance ("Commissioner") erred in including \$128,765.00 -- given to petitioner, a former professor, as an annuity payment by the State University of New York -- in petitioner's taxable income, rather than excluding it under Tax Law § 612(c)(3).

The Division submitted its answer on February 11, 1993, denying petitioner's allegations in the petition and asking that the petition be denied and the notice sustained.

As relevant to this motion, in his affidavit in opposition to the Division's motion, petitioner's representative claims that petitioner's request for a conciliation conference was not untimely filed. Rather, he asserts that petitioner did not file a request for a conciliation conference within 90 days of the date the notice of deficiency was mailed because up to July of 1992, when petitioner did file his request, petitioner had been in contact with a Problem

¹Nancy G. Stone is a party to this matter by virtue of the fact that she and her husband filed a joint income tax return for the year in question. Therefore, all future references to petitioner will be to Martin L. Stone, individually.

²The Administrative Law Judge's finding of fact stated that the notice of deficiency was issued on December 30, 1991; however, in his opinion, the Administrative Law Judge concluded that the record was inadequate to determine the date of mailing. We modified this fact to reflect the record.

Resolution Officer of the Division regarding the reasons for the delay in petitioner's tax refund, and, later, regarding the basis for the deficiency notice sent to petitioner.

As evidenced by Exhibit "A" accompanying petitioner's affidavit in opposition, the Problem Resolution Officer wrote to petitioner on October 31, 1991, prior to the date the notice was sent to petitioner, to inform petitioner that she had received petitioner's inquiry (presumably, regarding petitioner's anticipated refund) and was "working on it and w[ould] be in touch with [petitioner] as soon as possible."

On March 6, 1992, in response to petitioner's inquiry, the Division notified petitioner of the reason for the assessment rendered against petitioner, namely that the pension retirement pay qualifying for an exclusion must be provided on Form W-2P or Form 1099R.

In response to this notice, petitioner sent the Division a copy of his W-2P for the year 1990, again requesting that the deficiency be cancelled and the overpayment refunded.

On June 15, 1992, the Division notified petitioner that he was not entitled to a subtraction of the pension received and reported on petitioner's federal adjusted gross income in 1990.

Petitioner responded on June 24, 1992, contesting the Division's position that petitioner's pension was not excludable from his 1990 taxes.

As proof of mailing of the notice of deficiency to petitioner, the Division submitted the affidavits (and attached exhibits) of Donna Biondo, Daniel B. LaFar, Martin Dolan and Eleanor Moon, employees of the Division, as well as copies of two letters from Caesar Taormina, a United States Postal Service employee.

The affidavit of Donna Biondo, Head Clerk of the Case and Resource Tracking System Unit of the Division, set forth the Division's general procedure for mailing out notices of deficiency (and determination) to taxpayers, including the delivery of the notices to the post office and the receipt from the post office of the postmarked documents following the mailing. In addition, her affidavit attests to the truth and accuracy of the copy of the certified mail record containing a list of the notices allegedly issued by the Division on December 30, 1991, including one addressed to

petitioner (see, Exhibit "A" attached to Biondo affidavit, Division's affidavits in support). The certified mail control number (P 911 002 962) and notice of deficiency number (L-004882518) assigned petitioner on the certified mail record match the numbers on the notice actually sent to petitioner (see, microfiche copy of petitioner's notice of deficiency, Exhibit "B" attached to Biondo affidavit, Division's affidavits in support).

Page one of the certified mail record is date stamped December 30, 1991 and is signed by a postal representative. All 61 pages (numbered by certified number block, i.e., pages 1-13 for the first number block, certified numbers 911 172 045 - 911 172 182; pages 1-6 for the second number block, certified numbers 911 753 341 - 911 753 403; and pages 1-42 for the third number block, certified numbers 911 002 646 - 911 003 106) bear the certified mail record print date of December 19, 1991, changed manually on the first page only to December 30, 1991, and the record print time of 4:27:38. Ms. Biondo explained in her affidavit that the print date for certified mail records is approximately 10 days prior to the mail date, in order to give sufficient time to review the notices by hand and to process the postage. She noted that the print date here was changed to conform to the actual date of delivery of the notices to the United States Postal Service.

It is noted that the certified mailing record submitted does not contain a total for the number of pieces listed or received at the post office. The total for the number of pieces listed is printed on the mailing record after the first certified number block as 138; however, there is no indication of the number of pieces received at the post office. The total for the number of pieces listed for the third certified number block is printed as 461; however, again, no total is given for the number of pieces received at the post office. Finally, no totals of any kind are printed for the second certified number block.

The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of business when handling certified mail items. As well, this affidavit attests to

the fact that the regular procedures were followed in mailing the notice of deficiency in question on December 30, 1991.

The affidavit of Martin Dolan, a Senior Computer Programmer Analyst in the Information Systems Management Bureau of the Division discusses the Division's regular practice of retaining microfiche copies of statutory notices, rather than hard copies of the notices themselves. Mr. Dolan also attested to the fact that the microfiche copy of the notice sent to petitioner on December 30, 1991 submitted with his affidavit is a true and accurate copy (see, Exhibit "A" attached to Dolan affidavit, Division's affidavits in support).

The affidavit of Eleanor Moon, a Mail and Supply Clerk in the Registry Unit of the Division discusses the use of Postal Form 3811-A, a Request for Return Receipt form, used by a mailer to request return receipts after mailing, inter alia, certified mail. Ms. Moon recalls that, in this case, she prepared a form 3811-A based upon information provided to her by the Division, including the date of mailing, the certified number and the name(s) of the addressee(s). She mailed the form 3811-A to the Watermill Post Office, where petitioner's mail is sent, and received it back with petitioner's name written in the slot for addressee, and 1-2-92 written in the "date of delivery" slot.

The letters from Caesar Taormina, the Manager of Consumer Affairs/Claims at the United States Postal Service explain the use of Form 3811-A as a means of verifying delivery of certified mail after delivery, and discuss the use of Form 3849 to prove receipt of registered and certified mail. Exhibit "6" attached to the packet of affidavits submitted by the Division along with its motion papers contains a copy of Postal Form 3849, date stamped January 2, 1992 by the Watermill, N.Y. post office, and signed "received" by Martin Stone on 1-2-92, with certified mail number P - 911 002 962 written on it, the same number printed on both the certified mail record (next to petitioner's name) and petitioner's notice of deficiency.

OPINION

The Administrative Law Judge found that while the Division established proof of its standard mailing procedure, its mailing record was inadequate to prove that the standard mailing procedure was followed in this matter. However, the Administrative Law Judge determined that:

"where petitioner's receipt of the notice is documented by Postal Service Form 3849 (see, Exhibit '6' attached to Division's affidavits in support of motion) and, moreover, where petitioner concedes receipt, the 90-day limitations period for filing begins to run upon the date of delivery of the notice, or January 2, 1992 (see, Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992)" (Determination, conclusion of law "F").

The Administrative Law Judge, therefore, granted the Division's motion for summary determination and dismissed the petition as untimely because petitioner's request for a conciliation conference was not filed until July 23, 1992, which is not within 90 days of January 2, 1992, the date of delivery of the notice of deficiency.

With respect to petitioner's argument that the 90-day period should not begin to run until the taxpayer is made aware of the issues involved, the Administrative Law Judge found that this argument has no merit. The Administrative Law Judge stated that "the Division does not have an obligation to 'go behind the Notice of Deficiency to explain its basis' (see, Matter of Friedman, Tax Appeals Tribunal, December 8, 1988; Matter of Matson, Tax Appeals Tribunal, March 10, 1988)" (Determination, conclusion of law "I"). The Administrative Law Judge further stated that there is no provision in the Tax Law that would toll the statutory period in order for an inquiry to be made into the purpose of the assessment. The Administrative Law Judge stated that such a provision would "render meaningless the 90-day rule and obviate the entire purpose of having a statutory time limit" (Determination, conclusion of law "J").

In addition, the Administrative Law Judge found that petitioner was informed of the underlying reason for the assessment prior to the expiration of the 90-day period on April 1, 1992 as evidenced by the statement in petitioner's reply affidavit that "[a] notice of Assessment Resolution dated 03/06/92 for the first time indicated that the only problem was that the pension retirement pay qualifying for an exclusion must be furnished on Form W2P or 1099R" (Reply

Affidavit, p. 1). In addition, the Administrative Law Judge noted that the notice of deficiency apprised petitioner of the amount due, of his right to protest the assessment and the date by which a request for a conference or petition for a hearing had to be filed in order to stop the deficiency from becoming an assessment.

On exception, petitioner argues that:

"long before there was any assessment made taxpayer initiated an inquiry with the State's Problems and Resolution Section concerning his refund due to him. This process continued and continues independent of any assessment. In point of fact it was evident as supported by documentation that taxpayer was entitled to his refund and met the burden of proof. It is unseemly for the State to hide behind a technicality [sic] to deny taxpayer his due" (Exception, p. 2).

We find no basis in the record before us for modifying in any respect the determination of the Administrative Law Judge. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Martin L. and Nancy G. Stone is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Martin L. and Nancy G. Stone is dismissed.

DATED: Troy, New York
August 25, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner